In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 410

JOHN ODEAN CASS AND HOMER RAY PREVETTE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1969. The petition for a writ of certiorari was filed on July 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence sustained the conviction of petitioners for various liquor law violations.

2. Whether the trial court gave proper instructions as to the inference which might be drawn from the unexplained presence of individuals at the site of an illicit still.

3. Whether the sentence imposed upon petitioners was improper because it was more severe than that imposed upon co-defendants who pleaded guilty.

STATEMENT

As indictment returned in the United States District Court for the Middle District of North Carolina charged petitioners and co-defendants Efird and Gregory with (a) carrying on a distillery business without having given a bond, in violation of 26 U.S.C. 5607(a)(4), (b) fermenting mash fit for distillation on premises not designated according to law, in violation of 26 U.S.C. 5601(a)(7), and (c) possessing distilled spirits in containers to which the required tax stamps had not been affixed, in violation of 26 U.S.C. 5205(a)(2) (3 R. 5-7). Before trial, Efird pleaded guilty to count 3 and Gregory pleaded guilty to count 1; the other counts were dismissed as to them (3 R. 7-21). Petitioners went to trial and were convicted by a jury on all three counts. For the purpose of sentencing the three counts were consolidated into one (4 R. 456, 458), and petitioners were sentenced to imprisonment for 36 months (1 R. 11-12).[1]

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[1] Efird was sentenced to imprisonment for 24 months, and Gregory to 30 months.

The court of appeals affirmed *per curiam* (Pet. 17).

During the period March 5 to 15, 1968, law enforcement officers had rural premises in North Carolina belonging to Efird under observation. These premises had not been used for farming purposes for a considerable time (3 R. 69-72). In the afternoon of March 7, petitioner Cass, co-defendant Gregory, and an unidentified man drove onto the premises. While Gregory parked the car in a barn, Cass and the unidentified man remained outside. They ran behind the house and remained there for a few moments when a car passed by. All three men then entered the barn and were not seen again during the remainder of the surveillance, which lasted until midnight. During the course of the evening, a passenger car and truck arrived and entered the barn. Noises of "bumping and thumping" were heard, after which the vehicles left the area with their lights extinguished (3 R. 137-139).

On the afternoon of March 11, Cass and another man arrived at these premises. They later disappeared into the barn, not to be seen during the balance of the surveillance, which again lasted until midnight (3 R. 179-180).

During the afternoon of March 12, Cass and Gregory were seen leaving the barn and the premises by car. In the course of the evening, a truck, with its lights out, arrived. Efird, coming from the barn, conversed with the driver and the truck then backed into the barn. Another passenger car arrived shortly thereafter, also without its lights on (3 R. 139-143).

On March 15, at about 3:00 p.m., Cass, Prevette, and Gregory arrived by car at the premises. Something on the ground outside the barn attracted their attention. Prevette crossed the road to where the officers were concealed, saw them and fled. Other officers, contacted by radio, then proceeded to raid the barn (3 R. 174-178). Inside the barn, at its southwest corner, was found a trap door, concealed under bales of straw. It led to an underground room 120 feet long by 15 feet wide, containing twelve stills, each of more than a 1,000-gallon capacity. The stills were fired by a furnace-type oil blower, drawing on a 2,000-gallon storage tank. The officers found 7,000 gallons of mash and 723 gallons of distilled spirits (3 R. 72-74). No sign indicating registration was posted and no tax stamps were affixed to the containers of spirits (3 R. 144). Latent fingerprints of Cass were found on five yeast cans and a soft drink bottle in the still room (3 R. 199-200, 224-228, 235; 4 R. 247-253). Petitioners lived in another county, at a distance of 65 to 80 miles from the premises in question (3 R. 111).

ARGUMENT

1. The evidence plainly supported the conviction of both petitioners of the offenses charged. Cass, a resident of a distant locality, was seen repeatedly at the still site. The jury could properly infer that his preoccupation with activities within the barn had to do with the elaborate distilling opeartion which was later discovered, especially since these rural premises were not in agricultural use. Moreover, his fingerprints

were found on a number of objects located in the still room. It was not incumbent upon the government to negate the possibility that this circumstantial evidence had an innocent explanation. *Holland* v. *United States*, 348 U.S. 121, 138; *Pinion* v. *United States*, 397 F. 2d 27, 28 (C.A. 5); *Feinstein* v. *United States*, 390 F. 2d 50, 54 (C.A. 8), certiorari denied, 392 U.S. 943; 2 Wigmore, *Evidence* (3d ed.), § 414, pp. 392-393.[2]

Although Prevette was seen at the still site on only the one occasion, he had arrived with Cass and Gregory, both of whom had spent prolonged periods in mysterious activities in the barn, the nature of which had subsequently become quite apparent. Moreover, Prevette's flight, when he saw the officers, could properly be taken into consideration along with the other circumstances in assaying his guilt. *Hickory* v. *United States*, 160 U.S. 408, 420; *Pinion* v. *United States*, *supra*, 397 F. 2d 27, 28 (C.A. 5); *United States* v. *Heitner*, 149 F. 2d 105 (C.A. 2), certiorari denied *sub nom. Cryne* v. *United States*, 326 U.S. 727. Cf. *Sibron* v. *New York*, 392 U.S. 40, 66-67; *Green* v. *United States*, 259 F. 2d 180 (C.A.D.C.), certiorari

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[2] In one of their questions presented (Pet. 3), petitioners raise, but do not argue, the issue that the admission of the fingerprint evidence was erroneous on the ground that the government did not show that this evidence came from the scene of the crime. The short answer is that the items upon which the fingerprints were found were located at the scene of the crime, and it was a fair assumption that they were made by Cass at that location.

denied, 359 U.S. 917; *Corbin* v. *United States*, 253 F. 2d 646, 650 (C.A. 10).[3]

2. The trial court charged the jury with the substance of 26 U.S.C. 5601(b)(2)—*i.e.*, that whenever a person on trial for carrying on an illicit distilling business is shown to have been on the premises where the business was being carried on, such presence was deemed sufficient to authorize conviction unless explained to the satisfaction of the jury. The similar presumption of subsection (3), where the activity is the fermenting of mash fit for the production of distilled spirits, was likewise explained to the jury. Immediately thereafter, however, the jury was cautioned that such inferences did not require conviction; that if they had any reasonable doubt of guilt, they should acquit; and that presence was a mere circumstance to be considered with all the other circumstances in the case (4 R. 349-352).

The instruction regarding presence as permitting a conviction for carrying on the business of a distiller was clearly authorized by this Court's decision in *United States* v. *Gainey*, 380 U.S. 63. Since the court consolidated the counts for purposes of judgment and sentence (see 4 R. 456, 458), and the evidence is sufficient to support the verdict on the carrying on of the business count (count 1), there is no occasion to reach the validity of the presumption in-

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[3] Moreover, the jury could deem it significant that Prevette, who, like Cass, lived 65 to 80 miles from the location of the still, frequented this location which had no other ostensible use.

struction given with regard to the count relating to the fermenting of mash.[4]

3. The sentences imposed were well within statutory limits. The trial court expressly disclaimed any intention to penalize petitioners for exercising their right to jury trial (4 R. 444). Ample reasons for distinguishing between the sentences imposed upon petitioners and upon their co-defendants appear in the careful hearing conducted before determination of the sentences (4 R. 423, 431-434, 439, 443, 448, 453).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1969.

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[4] In *United States* v. *Romano*, 382 U.S. 136, on which petitioners place considerable reliance (Pet. 10-14), the Court struck down as irrational the presumption that presence at a still site permitted the jury to convict for possession of a still. That presumption is not involved in this case. Accordingly, petitioners are mistaken in suggesting (Pet. 6) that a conflict between that holding and the decision below exists.

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